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IN THE SUPREME COURT OF THE UNITED STATES
FALL TERM, NINETEEN HUNDRED AND EIGHTY-TWO

CASE NUMBER 82-186

ERNEST WADERE SHAHID, JR.,

PETITIONER.

versus

STATE OF FLORIDA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

REPLY BRIEF FOR PETITIONER

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REBUTTAL PRESENTED

I

THE ATTORNEY GENERAL'S STATEMENT THAT "IF PETITIONER WAS COERCED INTO ENTERING THE PLEAS OF NOLO CONTENDERE, THEN HE LIED UNDER OATH" IS CONTRARY TO THE RECORD BEFORE THIS COURT.

II

THE PETITIONER RELIED UPON THIS COURT'S DECISION IN SANTOBELLO V. NEW YORK, 404 U.S. 257 (1971), IN HIS BRIEF OF APPELLANT TO FLORIDA'S FIRST DISTRICT COURT OF APPEAL WHEN HE CITED STATE CASES WHICH RELIED UPON SANTOBELLO V. NEW YORK, SUPRA, AS SOURCE AUTHORITY.

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ARGUMENT

I

THE ATTORNEY GENERAL'S STATEMENT THAT "IF PETITIONER WAS COERCED INTO ENTERING THE PLEAS OF NOLO CONTENDERE, THEN HE LIED UNDER OATH" IS CONTRARY TO THE RECORD BEFORE THIS COURT.

The Attorney General of the State of Florida on page 9 of his "Brief For Respondent In Opposition" states, "The allegation that petitioner was coerced into entering the nolo contendere plea found on p. 11 of the petition is interesting. If petitioner was coerced into entering the pleas of nolo contendere, then he lied under oath." This statement by the Attorney General for the State of Florida has no factual basis in the Record before this Court. To support this unfounded allegation, the Attorney General cites portions of the Record out of context in such a way as to be misleading. The portion of the rights colloquy quoted by the Attorney General is as follows:

> Q. Have there been any threats, force, pressure or intimidation upon you in order to force you to plead nolle contendere?

A. No sir.

Q. Have there been any promises made to you other than in open Court today and as fully discussed in open Court?

A. No sir.

Id., Joint Appendix, page 14. The proceeding part of the colloquy omitted by the State in its citation goes as follows:

> JUDGE: And there is no agreement between the defense and the State as to the sentence which could be imposed upon this defendant, the sentence being solely in the discretion of the Court? Is that correct?
> MR. DEWRELL: That's correct, your Honor.
> MR. BRACE: It is understood by the State that it is within the discretion of the Court. It is further understood by the State that the defendant is going to receive the maximum sentence permissible under the law, that being 30 years on the trafficking and five years on the possession.
> JUDGE: Mr. Shahid, do you understand the terms and conditions of the plea so far announced by your counsel?
> MR. DEWRELL: No sir, he does not because Mr. Brace has just perhaps unintentionally, as my client pointed out to me violated one of the tenants of our agreement; specifically, that the State would stand mute as to sentencing in this cause and that would be a matter solely within the discretion of the Court. If I am wrong, correct me, Keith.
> MR. BRACE: That may well be, because negotiations have been going on for a week and the terms of the negotiation have changed daily. However, I don't think

it's unusual for all parties before the Court to discuss what the sentence is going to be. I don't think that comes as a surprise to anyone. It certainly doesn't come as a surprise to me.

Id., Joint Appendix, page 7. Obviously, the prosecutor's promise to stand mute as to the sentence imposed was one of the promises fully discussed in open Court. When Judge Barron asked the Defendant, "Have there been any promises made to you other than in open Court today and as fully discussed in open Court?" he exempted the prosecutor's promise to stand mute since that promise had already been fully discussed. It is evident, when reading the colloquy as a whole, that Petitioner did not perjure himself.

ARGUMENT

II

THE PETITIONER RELIED UPON THIS COURT'S DECISION IN SANTOBELLO V. NEW YORK, 404 U.S. 257 (1971), IN HIS BRIEF OF APPELLANT TO FLORIDA'S FIRST DISTRICT COURT OF APPEAL WHEN HE CITED STATE CASES WHICH RELIED UPON SANTOBELLO V. NEW YORK, SUPRA, AS SOURCE AUTHORITY.

The Attorney General in his Brief For Respondent In Opposition, states that the Petitioner did not rely upon this Court's decision in Santobello v. New York, supra, as source authority in his Appeal to Florida's First District Court of Appeal. Respondent is wrong.

While it is true that the Petitioner did not cite Santobello v. New York, supra, in his Brief of Appellant, the Petitioner did rely upon it as source authority through his citation of Wood v. State, 346 So.2d 143, 144 (Fla. 1st DCA 1977) and State v. Schelter, 309 So.2d 59, 60 (Fla. 2d DCA 1975). Both of these cases relied on this Court's decision in Santobello v. New York, supra. In Wood v. State, supra,

the First District Court of Appeal cited Santobello, holding:

> Appellant relies heavily upon Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), in which the United States Supreme Court remanded a somewhat similar case to the state court when it found the plea bargain agreement had been violated by the State. The prosecuting attorney had agreed he would make no recommendation as to sentence, but at sentencing another prosecutor, who replaced the prosecutor who had negotiated the plea, recommended the maximum sentence.

Id., Wood v. State, page 144. The Petitioner in his Brief Of Appellant to Florida's First District Court of Appeals, cited Wood v. State, supra, in the following context:

> "The plea bargaining agreement involved herein is sometime referred to as the Adams type, to-wit: that the prosecutor will make a recommendation at sentencing but that this recommendation (or lack of recommendation as here) is not binding upon the Court. State v. Adams, 342 So.2d 818 (Fla. 1977). As stated in Wood v. State, 357 So.2d 1060 (Fla. 1st DCA 1978):
>
> > "...The agreement inducing the plea is completely fulfilled when the prosecutor makes his recommendation as agreed; . . ."
>
> If the terms of the plea agreement are that the prosecutor will stand mute at sentencing, as in this case, then the prosecutor has fulfilled his agreement if he does just that, stands mute. Wood v. State, 346 So.2d 143 (Fla. 1st DCA 1977)."

Id., Joint Appendix, page 70. There can be no doubt that, from the foregoing text, the Petitioner relied upon Santobello v. New York, supra, sub nomine Wood v. State, supra.

In State v. Schelter, 309 So.2d 59, 60 (Fla. 2d DCA 1975), the Second District Court of Appeal cited Santobello v. New York, supra, in its opinion:

> We cannot say that the State has an affirmative duty to disclose other pending charges of which it has knowledge to a defendant when bargaining a plea on a separate charge. It also is not a denial of fundamental due process. In securing agreements under Criminal Rule of Procedure 3.171 between an accused and a prosecutor, such negotiations should be conducted in such a manner to be completely fair to both the accused, and the State. Santobello v. New York, 401 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427. If in fact Deputy Mathews misled the appellee, the plea bargaining negotiations were not conducted in a fair manner and the appellee entered his guilty plea under a misapprehension of the true facts.

Id., State v. Schelter, page 60. The Petitioner, in his Brief of Appellant, cited State v. Schelter, supra, in the following context:

The fact that the Court is not bound by the prosecutor's recommendation, and the defendant is so informed by the Court at sentencing, does not excuse the prosecutor's violation of the plea agreement. As the Court stated in Crossin v. State, 262 So.2d 250 (Fla. 4th DCA 1972):

> "Although the Court was not bound by these negotiations, the State was bound either to make the recommendation as it had promised, or to advise appellant, prior to the withdrawal of her not guilty plea, that it could not do so. Ward v. State, 1945, 146 Fla. 185, 22 So.2d 887. The state having failed to keep its end of the bargain, the plea became in essence an involuntary one."

If the State breaks any promises it made in reference to the plea agreement, the agreement becomes involuntary as is stated in State v. Schelter, 309 So.2d 59 (Fla. 2d DCA 1975):

> "If, upon remand, the Trial Court determines that the appellant was misled by the statements of Deputy Mathews or that the State has broken any promises which it made pertaining to the negotiations for the plea, the Trial Court has the discretion as to what ultimate relief should be granted appellees, i.e.: allow him to withdraw the plea of guilty induced by the negotiations or the dismissal of the second charge involved in the instant cause."

Id., Joint Appendix, pages 70-71.

From the foregoing citations from the Brief Of Appellant

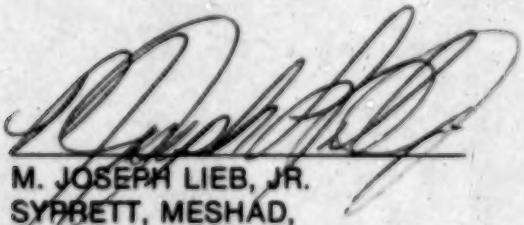
and the cases cited therein, there can be no doubt that the Petitioner relied upon Santobello v. New York, supra, as source authority sub nomine Wood v. State, supra, and State v. Schelter, supra.

The Court should know that in the lower court the Respondent, State of Florida, never filed an answer brief. Had the Respondent done so, surely Santobello, sub nomine, State v. Schelter and Wood v. State, would have been established. The failure of the Respondent to file its brief in the Court below explains Respondent's unfamiliarity with this cause. A reading of either State v. Schelter or Wood v. State shows both those cases are based on Santobello.

Accordingly, the Petitioner submits that he has fully and correctly presented the claims listed in this Petition to the lower court.

CONCLUSION

For the foregoing reasons, the Petitioner requests that this Court issue a Writ of Certiorari to review the decision of Florida's First District Court of Appeals in Shahid v. State, 415 So.2d 1368 (Fla. 1st DCA 1982), and the constitutionality of Florida Rule of Criminal Procedure, 3.172(i).



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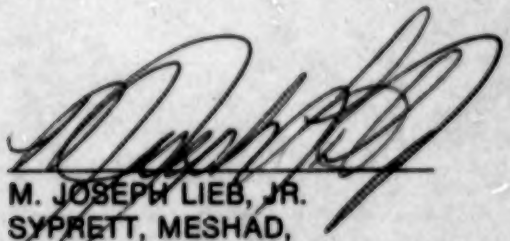
CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of this Reply Brief upon the Honorable JIM SMITH, Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32304, and WALLACE E. ALLBRITTON, Assistant Attorney General, Department of Legal Affairs, The Capitol, 1502, Tallahassee, Florida 32301, by placing same in sealed posted prepaid envelopes and depositing them in the United States mail on this 8th day of NOVEMBER, 1982.



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